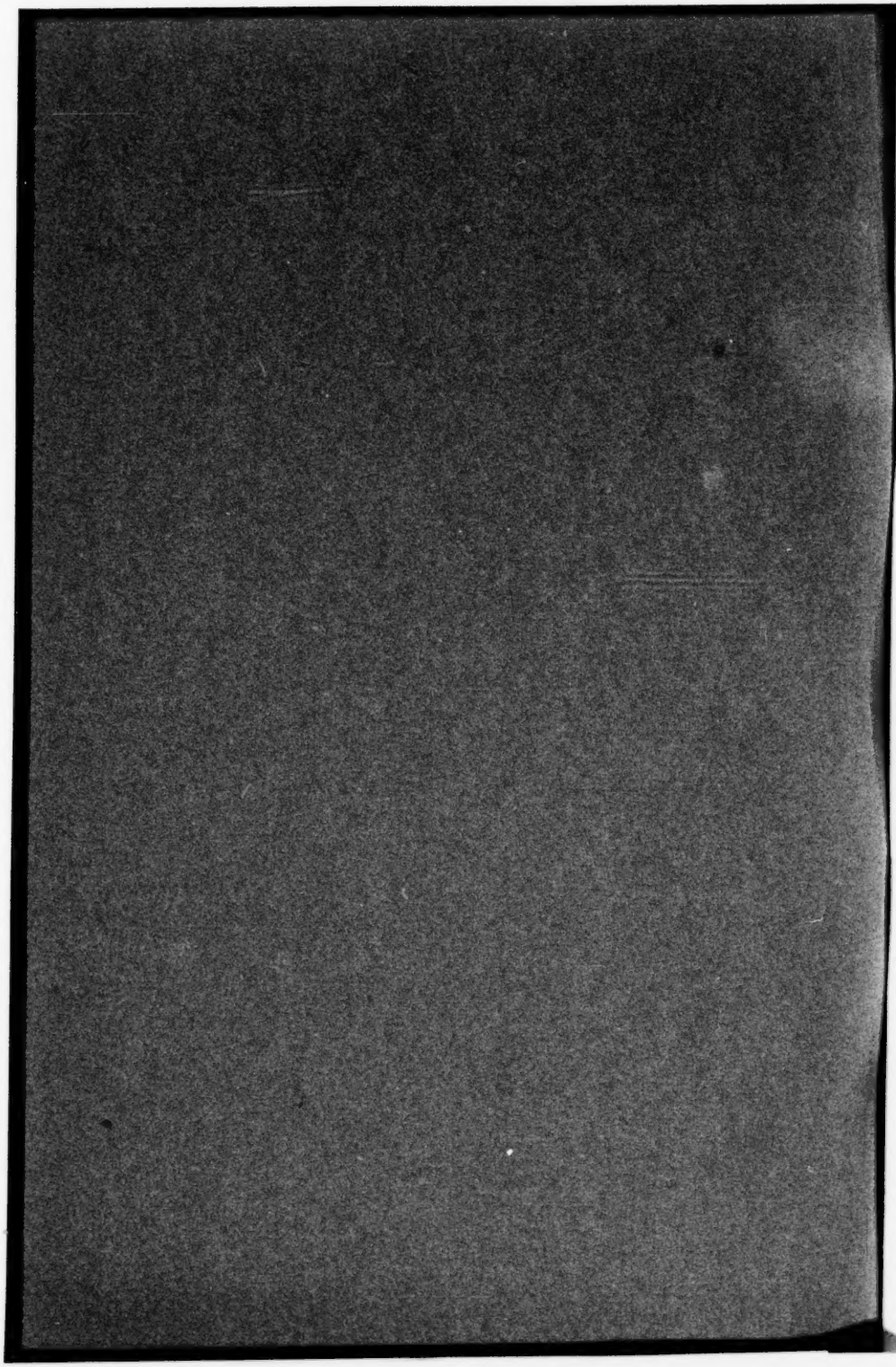

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. _____

WINTERS BATTERY MANUFACTURING COMPANY,

Petitioner,

v.

W. J. USERY, JR., Secretary of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported as of this writing. Copies of the relevant orders of the Occupational Safety and Health Administration and the orders and opinion of the Court of Appeals are set out in Appendix A hereto.

JURISDICTION

(i) The Clerk's original order of summary enforcement of the citations made the orders of the Occupational Safety and Health Review by operation of law the statute was dated and entered July 2, 1975.

(ii) The Court of Appeals' order directing oral argument on the petitioner's petition for rehearing was dated and entered August 4, 1975. The opinion and order denying the petition for rehearing was dated and entered December 18, 1975. An order granting a stay of mandate pending filing of this petition was dated and entered January 14, 1976.

(iii) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a small manufacturer not represented by counsel and not warned of the importance of counsel in a citation of alleged Occupational Safety and Health Act violations and notification of proposed penalties pursuant to 29 U.S.C. §§ 658 and 659(a) and (b) was deprived of its liberty and property without due process of law by the provisions of 29 U.S.C. § 659(a) and (b) making such citations and notices final and unreviewable orders of the Occupational Safety and Health Review Commission unless the employer contests them within 15 working days, while 29 U.S.C. § 660(a) provides for review of all other orders of the commission and 29 U.S.C. § 660(b) allows the Secretary[1] to seek enforcement without time limitation and without any review of the appropriateness of enforcement.

---

[1] The word "Secretary" will refer throughout this petition to the present respondent and/or to his predecessors in office as Secretary of Labor during the pendency of the administrative and court proceedings.

BLEED THROUGH

2. Whether the penalties imposed under 29 U.S.C. § 666(b) and (c) are criminal in nature so as to require observance of the safeguards against warrantless searches and seizures under the Fourth Amendment, the freedom from compelled self-incrimination under the Fifth Amendment, and the right of jury trial, counsel and confrontation of witnesses under the Sixth Amendment.

3. Whether, even if the penalties be deemed civil as designated in 29 U.S.C. § 666, they can be imposed by an administrative tribunal or otherwise without a jury trial or appeal as guaranteed by the Seventh Amendment, or without any impartial hearing consistent with due process of law under the Fifth Amendment.

4. Whether the Secretary's citation shows on its face that the single "serious" citation for allegedly excessive exposure to lead was not based upon substantial evidence within the rule laid down by the Occupational Safety and Health Review Commission itself in *Secretary of Labor v. The Hydrate Battery Corporation*, OSHRC Docket No. 2311.

5. Whether the Court of Appeals erred in sustaining administrative orders that fail to show on their faces the facts conferring jurisdiction on the commission by the provisions of 29 U.S.C. § 652(3) and (5).

6. Whether the Court of Appeals erred in failing to consider as relevant to the petition for enforcement matters appearing in the certified record before it showing that the petitioner's engineering adviser, who had represented the petitioner in dealing with the Secretary's representatives, had been taking good faith steps to abate the complaints on a voluntary basis in conformity with the Congressional purpose of encouraging employers to reduce occupational hazards, see 29 U.S.C. § 651(b)(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

—Amendment IV

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . . ."

—Amendment V

"In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . and to have the assistance of Counsel for his defense."

—Amendment VI

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

—Amendment VII

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are those of the Occupational Safety and Health Act, Public Law 91-596, Dec. 29, 1970, § 2(b)(1), 84 Stat. 1590; § 3(3) and (5), 84 Stat. 1591; § 5, 84 Stat. 1593; § 9(a), 84 Stat. 1601; § 10(a)(b) and (c), 84 Stat. 1601; § 11(a) and (b), 84 Stat. 1602; § 17(b)(c) and (j), 84 Stat. 1606-07; as codified 29 U.S.C. §§ 651(b)(1); 652(3) and (5); 654; 658; 659(a) (b) and (c); 660(a) and (b); and 666(b)(c) and (j).

Pertinent portions of these statutes as codified are set out in Appendix B hereto.

STATEMENT OF THE CASE

The petitioner is a small manufacturer of electrical storage batteries. The genesis of the proceedings leading to this petition was an inspection of its plant in Nashville, Tennessee, by representatives of the Secretary pursuant to the Occupational Safety and Health Act of 1970, particularly 29 U.S.C. § 657. On the basis of this inspection, the Secretary issued on February 12, 1973, a citation alleging seven "non-serious" and one "serious" violation of the Act and notice of proposed monetary penalties totaling $650 for the "non-serious" violations and $750 for the "serious" violation. [See Appendix A, pp. 18-23, *infra*.]

The allegedly serious violation consisted of an allegation of findings of eight-hour weighted average concentration of lead at certain employee stations within the plant amounting to less than 1 milligram per cubic meter but did not allege any facts showing that such concentration constituted the existence of "a substantial probability that death or serious physical harm could result" within the

standard of 29 U.S.C. § 666(j) as interpreted by the Occupational Safety and Health Review Commission in *Secretary of Labor v. The Hydrate Battery Corporation*, OSHRC Docket No. 2311 [copy appended hereto for the convenience of the Court as Appendix C].

The citation likewise failed to disclose facts showing that the petitioner was an employer "engaged in a business affecting the commerce who has employees" within the meaning of 29 U.S.C. § 652(a)(3) and (5).

The notice of proposed penalties failed to disclose the standards used or reasons for the amount of forfeitures proposed.

The petitioner attempted in good faith to cooperate with the Secretary's representatives by employing an engineer to represent it with them and to work out corrections for their complaints. It did not hire a lawyer for advice or seek to contest or question the citation. The petitioner and its engineer succeeded in correcting promptly all but one of the "non-serious" items complained of, but ran into practical difficulties in its efforts to correct one "serious" complaint and one of the "non-serious" complaints. The engineer filed petitions for extensions of time to correct these problems, reciting in detail the efforts made and difficulties encountered in making the corrections. Some of these petitions were granted without opposition and for obviously good reason, but the first objection to the length of time requested was sustained by the Review Commission without giving reasons. Within two weeks after the expiration of the last extension and two days after Christmas, 1973, the Secretary's representatives conducted another inspection and gave notice January 22, 1974, of additional penalties for failure to abate the remaining alleged violations. [See Appendix A, *infra*, p. .]

The certified record is silent as to proceedings after that date until April 7, 1975, when the Secretary filed a petition for summary enforcement of its citations and notices, considered as final orders of the Review Commission, alleging jurisdiction of the Clerk of the Court of Appeals pursuant to 29 U.S.C. § 660(b).

The petitioner then retained a lawyer, who filed a response to the petition, challenging the propriety of an enforcement order on various grounds. On July 2, 1975, the Clerk of the Court of Appeals entered an order of summary enforcement.

The petitioner then filed a timely petition for rehearing raising a number of constitutional issues as well as calling attention to factual matters on the face of the record as certified by the Secretary's representative.

On August 4, 1975, the Court of Appeals entered an order setting the petition for rehearing for oral argument on October 6, 1975. After briefing and oral argument, a panel of the Court handed down an opinion December 18, 1975 holding that:

1. "We decline to allow the Clerk of this court to become a rubber stamp for OSHA or any other agency. No person should be subjected to the contempt jurisdiction of this court unless he has violated an order or decree approved by the court and entered at the direction of the court," and that as thus interpreted, there is no constitutional infirmity in 29 U.S.C. § 660(b) with respect to the Clerk's duties.

2. The statute provided the petitioner an opportunity for a due process hearing before an Administrative Law Judge and the Commission, and the right to judicial review but that it "forfeited that right by failing to give notification of contest within fifteen working days."

3. That the petitioner's other constitutional contentions would be rejected.

There was no mention of non-constitutional objections based on the certified record.

A timely petition for stay of mandate was granted January 14, 1975.

The Court of Appeals had jurisdiction to review the matter pursuant to 29 U.S.C. § 660(b).

REASONS FOR ALLOWING THE WRIT

1. *The Court of Appeals has decided several important questions of federal administrative and constitutional law that have not been, but should be, settled by this Court.*

A. *Due Process*

The peculiarly harsh forfeitures of constitutional rights and property reserved only for cooperative and non-litigious employers by the Occupational Safety and Health Act, 29 U.S.C. § 659(a) and (b) present an anomaly unlike anything present counsel has found in any prior decision of this Court.

A small employer who employs an engineer and tries to satisfy the Secretary's agents as soon as they descend upon him can, by his cooperation, forfeit all his constitutional and legal rights if the statute be read literally.

Conversely, a contumacious employer, particularly a large employer who hires counsel experienced in guarding against the pitfalls involved in dealing with bureaucratic procedures, can work his way up through a vast panoply of administrative and judicial defenses specifically provided by the same statute.

Furthermore, the Secretary has even greater latitude than the contumacious employer, with no time limit on his right to seek judicial enforcement.

The Court of Appeals ameliorated this statutory plan only in the minor respect of holding that judicial review to some extent would be available upon the Secretary's petition for enforcement, but the opinion shows that the extent of review would nevertheless be extremely limited. Indeed, in the case at bar it reviewed only the constitutional questions presented and overruled all but two of these summarily. It avoided a direct declaration of unconstitutionality of the provision for a mere Clerk's order of enforcement as provided by the statute by interpreting the statute to mean that the Clerk's order of enforcement could be entered only after a panel of the Court had considered the Secretary's petition and directed the entry of such an order.

The question of the due process issue raised upon the 15-day forfeiture provision was considered a serious one, but the petitioner's contention was overruled on authority of an approved quotation from *McLean Trucking Co. v. Occupational Safety and Health Commission*, 503 F.2d 8, 11 (4th Cir. 1974), which in turn quoted and relied upon *Yakus v. United States*, 321 U.S. 414, 433 (1944).

Petitioner respectfully contends that neither *McLean* nor *Yakus* is good authority for the point. *McLean*, in fact, had contested the citation against it and had had the series of hearings that are provided for litigious employers, including full review by a United States Court of Appeals. And the Court in the portion of the *McLean* opinion quoted by the Court below decided only that *issuing* citations and proposed penalties without a prior hearing did not violate due process, and not that there should be no review after

fifteen days. In addition, *McLean* specifically placed emphasis on availability of judicial review without considering the adequacy of the time period.

Yakus did, of course, uphold a harsh limitation on challenges to the validity of administrative action, but it acted during wartime under a statute enacted by Congress pursuant to its concept of its constitutional war powers. Furthermore, the majority of the Court emphasized its own concept of the exigencies and economics of the wartime emergency. As such, nothing in the *Yakus* decision should be taken as a precedent for sustaining peacetime statutory forfeitures enacted under the power to regulate commerce. Indeed, this Court would be justified in overruling *Yakus* in its entirety even if precisely the same questions arose again in a wartime setting on precisely the same language, by adopting the better reasoning of the dissenting opinions, 321 U.S. at 448 and 460, or even by taking judicial notice of the historical fact that the economic assumptions underlying the statute and the opinion were wrong and proved to be useless in practice even in wartime.

But *Yakus* need not be overruled in the present peacetime setting. Indeed, it is enough to point out that the forfeiture period considered in that case was two months, whereas the period here challenged is only 15 working days, which amounts to two to three weeks, depending on the number of workdays in a week at a given employer's place of business.

The Court of Appeals recognized that it could be argued that 15 days was too short a time, but held that was a matter for the judgment of Congress. But the reasoning is fallacious in that it delegates to Congress the judicial question of what time period would comport with due process by giving an adequate opportunity for a person desirous

of abiding by the statute to discover the need for adjudication under the particular facts of a given case.

Furthermore, it overlooks the complete forfeiture of all defenses that goes with an effort to cooperate rather than to litigate, and it overlooks the denial even of an opportunity to resist a petition for enforcement either on the basis of evidence not known to the employer within the 15 days or even on the basis of affirmative facts appearing on the face of the record certified by the Secretary himself.

> "'It is easy enough to say that a party has enough of a remedy if statutory review of the order is available and if he does not choose to employ that procedure he should be foreclosed from raising elsewhere the questions that could have been raised in that proceeding.' But to make this easy assumption is at once to decide the rock-bottom issue and, in my opinion, one this Court has not determined heretofore with effects upon the criminal process like those produced in this case."
>
> – *Yakus v. United States*, *supra*, 321 U.S. at 471 (dissenting opinion)

Furthermore, even if the short period and the differential mistreatment of the most cooperative employers could somehow be squared with constitutional due process standards, the Court is faced with an interpretation of the statute by the Court below that will have the necessary effect of defeating one of the primary purposes of the statute as stated by Congress: to assure safe working conditions "(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards."

Once he understood the pitfalls of this statute and of bureaucratic procedures generally, no employer in his right mind would hire an engineer to cooperate rather than a lawyer to litigate.

B. *Scope of Review*

It may be assumed, without conceding, that an administrative procedure that assesses a penalty may depart from the procedural standards for both criminal and civil proceedings under the Fourth, Fifth, Sixth and Seventh Amendments to the Constitution of the United States in the first instance.

It may even be assumed for present purposes, again without conceding, that an Article III court may be limited to a review of the record as made in the summary administrative proceedings.

But assuming all that, it does not follow that the Court is excused from examining every defect that may be found in that record, however it may have come before it.

In this case, the case was brought before the Court of Appeals by the Secretary's petition for enforcement. This petition was accompanied by a certified record that failed to show all the proceedings below or to show the evidence on which the Secretary's representatives had acted.

However, it was apparent from the face of that record:

(1) That the lead level constituting the allegedly serious violation was not such as to justify judicial notice that it was, in fact, a serious violation within the scope of the Act. There were not even conclusory findings that this level of airborne lead constituted a "substantial probability that death or serious physical harm could result from" it within the meaning of 29 U.S.C. §666(j).

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(2) There was a total absence of any allegations of facts or even conclusions in statutory language to show that the Occupational Safety and Health Commission had jurisdiction of this employer within the meaning of 29 U.S.C. § 652(3) and (5).

The Court of Appeals found, in effect, that upon the Secretary's petition, constitutional questions could be considered. Certainly a jurisdictional question could be considered.

Surely the injunctive and contempt powers of a court should not be granted where it is apparent that either a constitutional or jurisdictional defect rendered the order sought to be enforced void or voidable, or where essential findings are missing from the record. If the defects are correctible a remand for determination of the necessary facts and their inclusion in the record would be appropriate.

If a remand for these purposes would be appropriate, it follows that a remand would also be proper for determination of the probability of death or serious physical harm from a condition described in essentially meaningless statistics on alleged airborne lead, unsupported by any expert or even lay explanation of their significance.

This is particularly true in view of the Review Commission's own rules on this very problem where a much fuller record was available. See *Secretary of Labor v. The Hydrate Battery Corporation*, Appendix C.

2. *The Court of Appeals has so far sanctioned administrative departures from constitutionally required standards as to call for an exercise of this Court's power of supervision.*

A. *Nature of Penalties and Forfeitures*

That a fine is a penalty or forfeiture of property will hardly be contested. Whether or not it is denominated civil or criminal in nature, a procedure to impose a penalty or forfeiture is a proceeding in which the constitutional protections of the Fourth, Fifth and Sixth Amendments apply, unless *Boyd v. United States*, 116 U.S. 616, 630 (1886), was an erroneous exposition of constitutional law in its entirety despite the large volume of search and seizure law that has been built on its authority. See, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *cf. Warden v. Hayden*, 387 U.S. 294 (1967).

In *Boyd*, the case presented was an action, civil in nature, seeking forfeiture of alleged contraband. Throughout the opinion, the Court repeatedly coupled criminal and forfeiture proceedings as subject to the same constitutional protections. For example:

> "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to *convict him of crime or to forfeit his goods* is within the condemnation of that judgment [*Entick v. Carrigton*, 19 How. St. Trials 1029 (K.B. 1765)]. In this regard the Fourth and Fifth Amendments run almost into each other."
>
> – *Boyd v. United States*, *supra*, 116 U.S. at 630 (1886)

BLEED THROUGH

Nevertheless, in later opinions, the federal courts have approved administrative penalties. See the cases cited on this point in *Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1204 (3rd Cir. 1975).

The petitioner submits that *Boyd* expresses the correct rule and that those subject to penalties under the Occupational Safety and Health Act should be subject to the same protections as defendants in criminal cases. The contrary rule has crept into the law and been expanded very slowly beginning long after the relevant constitutional provisions were adopted. Like the jurisdictional and constitutional error of *Swift v. Tyson*, 16 Pet. 1 (1842), this is a constitutional error "'which no lapse of time or respectable array of opinion should make [this Court] hesitate to correct.'" *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

See on this growing problem: Charney, "The Need for Constitutional Protections for Defendants in Civil Penalty Cases," 59 Cornell L. Rev. 478 (1974).

Even if the penalties be deemed civil so as to be immune from the protections of the Fourth, Fifth and Sixth Amendments, the Seventh Amendment remains, and it should apply to an action at law, even if it is under a Congressional statute rather than under an Act of Parliament incorporated in American common law. See the dissenting opinion of Gibbons, J., in the *Frank Irey* case, *supra*.

B. *Waiver of Rights*

In *Carnley v. Cochran*, 369 U.S. 506, 514 (1962), this Court quoted *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), as follows:

"'It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights."'"

And the Court there went on, specifically discussing the right to counsel, to say:

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

The Court of Appeals in the present case recognized that the petitioner was entitled to due process of law under the Fifth Amendment, but added:

"It forfeited that right by failing to give notification to contest within fifteen working days . . . . The controlling fact is that respondent had a right to a due process hearing, which it failed to exercise. We find no deprivation of due process."

This is clearly presuming waiver of a constitutional right from a silent record, and without anything in the certified administrative record to show that the petitioner made that waiver intelligently and understandingly waived that right. He was, of course, advised that the citation would become a final order if not contested within 15 working days, but there is nothing to show that he knew what harsh and continuing consequences would follow his failure to contest if it turned out the problem was greater than originally thought.

Neither was there any hint in the citations or notice to suggest to the petitioner that he ought to consult a lawyer before stepping into the mire of automatically final orders under this peculiar Act.

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CONCLUSION

The petitioner respectfully contends the Court should hold that the Occupational Safety and Health Act is unconsitutional as applied to this petitioner, reverse the Court of Appeals and either dismiss the citations and notices of penalties or direct such further proceedings as may be necessary to protect the constitutional rights of the petitioner.

Respectfully submitted,

ROLAND M. LOWELL
618 Hamilton Bank Building
Nashville, Tennessee 37219

Attorney for the Petitioner

Of Counsel:

BUCK & BAKER

BLEED THROUGH

APPENDIX A

U. S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
1000 Hayes Street - Suite 302
Nashville, Tennessee 37203

CSHO NO	OSHA No.
Y-8116	15
AREA	REGION
1760	4

CITATION*

Citation Number 1, page 1 of 2 Date Issued February 12, 1973

EMPLOYER Winters Battery Manufacturing Company

ADDRESS (Street 10 Culvert Street

(City Nashville State Tennessee Zip 37210

An inspection of a workplace under your ownership, operation, or control located at 10 Culvert Street, Nashville, Tennessee and described as follows:

Automotive type batteries

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Item number	Standard or regulation allegedly violated 29 CFR	Description of alleged violation	Date on which alleged violation must be corrected
1	1904.2	A log of occupational injuries and illnesses was not maintained.	Immediately upon receipt of citation
2	1910.141(g)(3)(i)	Food was stored and eaten where toxic material was present.	Immediately upon receipt of citation
3	1910.141(g)(3)(ii)	Food stored in toilet room.	Immediately upon receipt of citation
4	1910.107(c)(2)	An open flame was within 20 feet of the spray booth, and was not separated by a partition.	Immediately upon receipt of citation
5	1910.107(g)(2)	Spraying area of paint spray booth was not kept as free as practical from accumulation of deposits of combustible residues.	Immediately upon receipt of citation

Area Director's Signature Eugene E. Light
Eugene E. Light
by R. Wilbur Davis

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that a penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* "Alleged" violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct and immediate relationship to occupational safety and health.

Form
OSHA

POOR COPY

U. S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

1600 Hayes Street
Nashville, Tennessee 37203

CASE NO	SHEET NO
Y-8116	15
AREA	REGION
1760	4

CITATION*

Citation Number 1, page 2 of 2 Date Issued February 12, 1973

EMPLOYER Winters Battery Manufacturing Company

ADDRESS (Street 10 Culvert Street

(City Nashville State Tennessee Zip 37210

An inspection of a workplace under your ownership, operation, or control located at 10 Culvert Street,

Nashville, Tennessee and described as follows:

Automotive type batteries

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Item number	Standard or regulation allegedly violated 29 CFR	Description of alleged violation	Date on which alleged violation must be corrected
6	1910.93(e)	Feasible administrative or engineering controls were not determined and implemented where employees were exposed to lead in excess of the permissible limit.	June 10, 1973
7	1910.134(a)(3)	The employer did not use the provided respiratory protection in accordance with instructions and training received.	Immediately upon receipt of citation

Area Director's Signature Eugene E. Light
Eugene E. Light
By D.P. Peters RAD

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that a penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.

Form AUG

BLEED THROUGH

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
1600 Hayes Street - Suite 302
Nashville, Tennessee 37203

CSHO NO.	OFFICE
Y-8116	15
AREA	REGION
1760	4

CITATION FOR SERIOUS VIOLATION*

Citation Number 1 of 1 Date Issued February 12, 1973

EMPLOYER Winters Battery Manufacturing Company

ADDRESS (Street 10 Culvert Street

(City Nashville State Tennessee Zip 37210

An inspection of a workplace under your ownership, operation, or control located at 10 Culvert Street, Nashville, Tennessee and described as follows: Automotive type batteries

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
29 CFR 1910.93(b)(1)	Employees were exposed to an eight hour time weighted average concentration of lead in excess of the limit of 0.2 milligrams per cubic meter given in Table G 2. Examples of such were: 1. Pasting machine-man dipper -0.71 milligram per cubic meter. 2. Mixing machine operator - 0.01 milligram per cubic meter.	June 10, 1973

Area Director's Signature Eugene E. Light
Eugene E. Light
By Lt. Robert Byrd

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that a penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* A serious violation, according to the Act "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k)

Form C
AUG. 71

POOR COPY

U. S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

OSHD NO	OSHA I No.
Y-8116	13
AREA	REGION
1760	4

NOTIFICATION OF PROPOSED PENALTY

TO: Winters Battery Manufacturing Company
10 Culvert Street
Nashville, Tennessee 37210

On the 12th day of February, 19 73 a Citation(s) was (were) issued to you in accordance with the provisions of section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 1601; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that Citation(s).

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of section 10(a) of the Act, the penalty(ies) set forth below is/are being proposed, based on the above Citation(s):

SERIOUS VIOLATIONS

Citation No.	Proposed Penalty
1 of 1	$ 750.00

OTHER VIOLATIONS*

Citation No.	Item No.	Proposed Penalty
1	1	100.00
1	2	90.00
1	3	None
1	4	90.00
1	5	None
1	6	185.00
1	7	185.00

Total for All Alleged Violations $ 1,400.00

*In the case of each "other violation," the proposed penalty reflects a 50 percent adjustment factor for corrective action taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, an automatic additional penalty of 50 percent will be proposed for each violation. However, if you contest an alleged violation in good faith before the Review Commission, the period for correction does not begin to run until the entry of a final order by the Review Commission affirming the citation. The proposed penalty is exclusive of such other additional penalty as may subsequently be proposed for failure to correct a violation within the abatement period.

(Continued on reverse side)

BLEED THROUGH

The payment of penalties is to be made by certified check or money order, payable to the order of "Occupational Safety and Health-Labor." Remit to the Area Director whose address appears below.

YOU ARE FURTHER NOTIFIED that the aforesaid Citation(s), this Notification, and the proposed assessment shall be deemed to be the final order of the Occupational Safety and Health Review Commission and not subject to review by any court or agency, unless, within 15 working days from the date of receipt of this notice, you notify the official named below in writing that you intend to contest the Citation or this Notification of Proposed Penalty before the Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties.

There is no requirement that this Notification be posted.

Dated at Nashville, Tennessee this 12th day of February, 19 73.

Eugene C Tigh
Area Director
Occupational Safety and Health Administration
U.S. Department of Labor
1600 Hayes Street - Suite 302
Nashville, Tennessee 37203

POOR COPY

US DEPARTMENT OF LABOR
Occupational Safety and Health Administration

R 6053	37	74
AREA	REGION	
1760	4	

1. 1600 Hayes Street - Suite 302
Nashville, Tennessee 37203

TO:
2. Winters Battery Manufacturing Company
10 Culvert Street
Nashville, Tennessee 37210

**NOTIFICATION
OF FAILURE TO CORRECT ALLEGED VIOLATION
AND OF PROPOSED ADDITIONAL PENALTY**

On the 3. 12th day of February, 19 73, a Citation(s) was (were) issued to you in accordance with the provisions of section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 1601; 29 U.S.C. 651, *et seq.*), hereinafter referred to as the Act, notifying you of certain alleged violations of the Act and the dates by which they were to be corrected.

Based upon reinspection conducted on 4. December 27, 1973, it is alleged that you have failed to correct the alleged violations specified below within the times prescribed:

5. SERIOUS VIOLATIONS:

5A. Citation No.	5B. Number of Days Failed to Correct		5C. Proposed Daily Additional Penalty		5D. Proposed Total Additional Penalty For Failure To Correct
1	10.00	X	56.00	=	560.00

6. NONSERIOUS VIOLATIONS:

6A. Citation No. and Item No.	6B. Number of Days Failed to Correct		6C. Proposed Daily Additional Penalty	=	6D. Proposed Total Daily Additional Penalty	-	6E. Previously Allowed Abatement Credit	=	6F. Proposed Total Additional Penalty For Failure to Correct
1 6	10	X	28.00	=	280.00	-	185.00	=	465 00

7. Area Director _____ 8. Date January 22, 19 74

(NOTICE: Additional Important Information On Reverse Side)

Form OSHA-2A
Rev. Sept. 1972

BLEED THROUGH

Appendix A

[fol. 1] No. 75-1367

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETER J. BRENNEN, Secretary of Labor,
Petitioner,
v.
WINTERS BATTERY MANUFACTURING CO.,
Respondent.

FILED
JUL 2 - 1975
John P. Hehman, Clerk

ORDER

This case is submitted on the petition of the Secretary of Labor for summary enforcement of a final order of the Occupational Safety and Health Review Commission.

The petition for summary enforcement avers that respondent never contested the citation, the notification of proposed penalties, or the accompanying abatement requirements. Respondent does not contend that it filed any notification of intent to contest within fifteen working days after the issuance of the citation.

The petition further avers that, after due notification and extensions of time, the respondent failed to abate certain of the violations which were the subject of
[fol. 2] the original citation. Respondent does not contend that it notified the Secretary within fifteen working days from the receipt of the notification that it wished to contest any part of the notification or proposed assessment of non-abatement penalty.

POOR COPY

In the absence of such notification within fifteen working days, the statute expressly provides that the citation, assessments, the notification of failure to abate and non-abatement penalties are deemed the final orders of the Commission and "not subject to review by any court or agency." 29 U.S.C. § 659(a) and (b).

No timely petition for review having been filed in this court pursuant to 29 U.S.C. § 660(a), "the Commission's findings of fact and order shall be conclusive in connection with [this] petition of enforcement." 29 U.S.C. § 660(b).

For these reasons, and not having been otherwise ordered by the court, it is hereby ORDERED that the orders of the Commission be enforced. 29 U.S.C. § 660(b).

ENTERED BY ORDER OF THE COURT.

By /s/ Grace Keller
Grace Keller
Chief Deputy

BLEED THROUGH

Appendix A

No. 75-1367

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
AUG 4 - 1975
John P. Hehman, Clerk

PETER J. BRENNEN,
SECRETARY OF LABOR,

Petitioner

vs.

WINTERS BATTERY
MANUFACTURING COMPANY,

Respondent

ORDER

No Judge in regular active service having moved for rehearing in banc, it is ordered that the petition for rehearing in banc is denied.

It is further ordered that the petition for rehearing be scheduled for oral argument before a panel of this Court during the Fall session of the Court.

Entered by order of the Court.
John P. Hehman, Clerk

By /s/ Grace Keller
Grace Keller
Chief Deputy

Appendix A

No. 75-1367

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETER J. BRENNEN, Secretary of Labor,

Petitioner,

v.

WINTERS BATTERY MANUFACTURING CO.,

Respondent.

PETITION for Summary Enforcement of an Order under the Occupational Safety and Health Act.

Decided and Filed December 18, 1975.

Before PHILLIPS, Chief Judge, and PECK and LIVELY, Circuit Judges.

PHILLIPS, Chief Judge. For the first time this court is called upon to interpret an act of Congress which provides that our Clerk, "unless otherwise ordered by the court," shall enter "forthwith" a decree enforcing an order of an administrative agency. The agency is the Occupational Safety and Health Review Commission (OSHRC). The statute, 29 U.S.C. § 660(b), is a part of the Occupational Safety and Health Act of 1970 (OSHA).

The Secretary of Labor filed a petition with the Clerk of this court for the summary enforcement of an OSHA order. The respondent, Winters Battery Manufacturing Company, filed an opposing answer. The Chief Judge of

BLEED THROUGH

the court prepared an order of enforcement and directed that it be signed

[2]

and entered by the Clerk. This order, dated July 2, 1975, is as follows:

> This case is submitted on the petition of the Secretary of Labor for summary enforcement of a final order of the Occupational Safety and Health Review Commission.
>
> The petition for summary enforcement avers that respondent never contested the citation, the notification of proposed penalties, or the accompanying abatement requirements. Respondent does not contend that it filed any notification of intent to contest within fifteen working days after the issuance of the citation.
>
> The petition further avers that, after due notification and extensions of time, the respondent failed to abate certain of the violations which were the subject of the original citation. Respondent does not contend that it notified the Secretary within fifteen working days from the receipt of the notification that it wished to contest any part of the notification or proposed assessment of non-abatement penalty.
>
> In the absence of such notification within fifteen working days, the statute expressly provides that the citation, assessments, the notification of failure to abate and non-abatement penalties are deemed the final orders of the Commission and "not subject to review by any court or agency." 29 U.S.C. § 659(a) and (b).
>
> No timely petition for review having been filed in this court pursuant to 29 U.S.C. § 660(a), "the Commis-

sion's finding of fact and order shall be conclusive in connection with [this] petition of enforcement." 29 U.S.C. § 660(b).

For these reasons, and not having been otherwise ordered by the court, it is hereby ORDERED that the orders of the Commission be enforced. 29 U.S.C. § 660(b).

ENTERED BY ORDER OF THE COURT.

By /s/ GRACE KELLER
Grace Keller
Chief Deputy

[3]

The respondent thereupon filed a petition for rehearing en banc. No judge moved for en banc reconsideration, Fed. R. App. P. 35, and the petition for rehearing was scheduled for oral argument before this panel on October 6, 1975.

We deny the petition for rehearing for the reasons stated in this opinion.

1) The Facts

Winters Battery is a Tennessee Corporation whose principal business is the manufacture and sale of automobile batteries. On January 17, 1973, an authorized representative of the Secretary of Labor inspected the Winters Battery factory and determined that one serious and seven non-serious OSHA violations were present. On February 12, 1973, Winters Battery was notified of these violations in writing and given a reasonable time for abatement as provided by 29 U.S.C. § 658(a).

BLEED THROUGH

The notice included the following warning as to the time limits in which respondent could preserve its rights to a hearing and review:

> You will soon be notified by certified mail whether or not a proposed penalty will be assessed as a result of the cited violation(s). You have the right to contest the citation(s), the proposed penalties, or both, before the Occupational Safety and Health Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties. If you do contest, you must so notify the Area Director within 15 working days after receipt of the certified mail notice regarding proposed penalties. If you fail to contest within the 15 working day period, the citation and the proposed assessment of penalties shall be deemed to be a final order not subject to review by any court or agency.

[4]

On the same date respondent was notified of a proposed penalty in the amount of $1,400. This notice contained the following warning:

> YOU ARE FURTHER NOTIFIED that the aforesaid Citation(s), this Notification, and the proposed assessment shall be deemed to be the final order of the Occupational Safety and Health Review Commission and not subject to review by any court or agency, *unless*, within 15 working days from the date of receipt of the notice, you notify the official named below in writing that you intend to contest the Citation or this Notification of Proposed Penalty before the Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties.

Respondent filed no expression of intention to contest either the citation or the notification of proposed penalty.

On May 30, 1973, Winters filed a written request for a six month extension of the abatement period. The Secretary did not object and the compliance date was extended until November 10, 1973. On November 5, 1973, Winters sought a second extension of the abatement period until May 10, 1974. The Secretary refused to grant the requested extension, but allowed Winters until December 15, 1973, to comply with the order. Another inspection took place on December 27, 1973, and it was determined that one serious and two nonserious violations had not been abated. On January 22, 1974, the Secretary issued a notice of failure to abate and proposed penalties totaling $1,025. Again Winters failed to give notice, within fifteen working days from receipt of notification, of intent to contest as required under § 659(a). On February 27, 1974, Winters sought and was granted another six month extension of the abatement period until September 1, 1974. On September 3, 1974, another inspection of the Winters plant revealed that one serious and one nonserious

[5]

violation had not been abated. On April 7, 1975, pursuant to § 660(b), the Secretary filed with the Clerk of this court a petition for summary enforcement. On April 16, 1975, the respondent filed an answer, to which the Secretary responded on May 6, 1975.

The above-quoted order of enforcement thereupon was entered on July 2, 1975. It is re-emphasized that this order was prepared by the Chief Judge of the court and was entered by the Clerk at the direction of the Chief Judge.

2) Function of the Clerk

Respondent challenges the constitutionality of the statute on numerous grounds which will be discussed later in this opinion. Specifically challenged is the provision of 29 U.S.C. § 660(b)[1] which states that the Clerk "unless otherwise ordered by the court" shall enter "forthwith" an order of enforcement. Respondent asserts that empowering the Clerk to enter summary orders of enforcement, without being so instructed by the court, is an unconstitutional delegation of judicial power.

[6]

The Secretary of Labor undertakes to defend this statutory provision by an argument which we find to be untenable: "The Clerk's action in lending the court's enforcement powers to the Secretary is purely ministerial in

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[1](b) The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) of this section shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a) of this section, is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 659 of this title, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a) of this section, the court of appeals may assess the penalties provided in section 666 of this title, in addition to invoking any other available remedies.

nature." We reject this contention. An order enforcing a decision of an administrative agency is a judicial, not ministerial, action. Enforcement by judicial decree provides a basis for contempt proceedings in this court in event of non-compliance. *See, e.g., N.L.R.B. v. Decaturville Sportswear Co., Inc.*, 518 F.2d 788 (6th Cir. 1975); *Local 98 United Ass'n. of Journeymen, etc. v. N.L.R.B.*, 497 F.2d 60 (6th Cir. 1974); *N.L.R.B. v. Local Union No. 80, Sheet Metal Wkrs.' Int. Ass'n*, 491 F.2d 1017 (6th Cir. 1974); *N.L.R.B. v. United Mine Workers of America*, 393 F.2d 265 (6th Cir. 1968), *cert. denied*, 393 U.S. 841 (1968); *N.L.R.B. v. Lynaire, Inc.*, 380 F.2d 286 (6th Cir. 1967).

Section 660(b) contains the following language with respect to contempt proceedings:

> In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a) of this section, the court of appeals may assess the penalties provided in section 666 of this title, in addition to invoking any other available remedies.

The Secretary contends that a petition for summary enforcement under the quoted parts of § 660(b) (see n. 1) is "not a petition for enforcement of the kind which opens up issues to judicial scrutiny," but is "rather a request for a decree enforcing outstanding, final and essentially self-executing Commission orders." It is urged that if a timely answer is not filed to the Secretary's petition for summary enforcement, the Clerk should "forthwith" enter the requested decree, apparently without any direction from the court.

We decline to allow the Clerk of this court to become a rubber stamp for OSHA or any other agency. No person

[7]

should be subjected to the contempt jurisdiction of this court unless he has violated an order or decree approved by the court and entered at the direction of the court.

So as to remove any doubt as to the procedure to be followed in future OSHA cases, we direct that the Clerk of this court shall not be authorized or permitted to sign and enter orders of enforcement under § 660(b) except upon express authorization and direction by a panel of the court. Each petition for enforcement shall be referred to a panel of the court for disposition. The panel will decide whether the proposed order is final and unreviewable and whether summary enforcement should be granted. Orders in OSHA cases will set forth the names of the judges constituting the panel which has adjudicated the matter. Orders signed by the Clerk will not contain the words "not having been otherwise ordered by the court," but shall conclude with the words "Entered by order of the court." The procedure herein outlined will be followed in all OSHA cases.

In administering § 660(b), the Clerk is not empowered to enter summary orders of enforcement without first having been so directed by the court.

When thus interpreted and administered, there is no constitutional infirmity in this section.

The Secretary further contends:

5. We further note that our interpretation of the pertinent summary enforcement language is supported by the Act and its legislative history. Section 11(b) itself states that "The Commission's findings of fact

and order shall be conclusive" in any petition for enforcement filed by the Secretary after sixty days from that order—a provision which facially includes settlement agreements incorporated in final Commission orders and indicates there should be very little if anything to litigate in such enforcement proceedings. Moreover, the Act in general is designed to insure expeditious abatement

[8]

by self-executing orders which automatically become final and substantively unreviewable unless the aggrieved employer timely takes subsequent statutory steps. Thus, citations and notifications of failure to abate become final and unreviewable unless contested within 15 working days, 29 U.S.C. 659(a) and (b); decisions of the Commission's administrative law judges become final unless the Commission directs review within 30 days, 29 U.S.C. 661(i), 660(a); and Commission orders become final and unreviewable unless appealed within 60 days, 29 U.S.C. 660(a). A judicial enforcement proceeding which accepts this finality is the necessary complement to realization of the Congressional goal of swift abatement of occupational hazards. E.g., Leg. Hist. 194-195, 463, 470. ("Leg. Hist." references are to Committee Print, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92d Cong. 1st Sess. (June 1971)) Absent of a specific statutorily-prescribed procedure for such petitions, it accordingly falls to the Secretary and the Courts to fashion a proceeding which effectuates the Congressional intent. Cf. *Brennan v. OSHRC and Kesler & Sons Const'n. Co.*, 515 F.2d 553 (10th Cir. 1975). That intent would clearly not be effectuated by permit-

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ting or requiring full-scale substantive briefing and argument on every summary enforcement petition which is answered—a result which would make the time limits on employer petitions, 29 U.S.C. 660(a), and the section's conclusiveness language largely meaningless.

6. The legislative history of 29 U.S.C. 660(b) additionally supports our interpretation that summary enforcement petitions are routinely to result in swiftly-issued decrees rather than time-consuming formal appellate proceedings. The Senate bill as reported and passed contained a substantively identical provision which was repeatedly described, in express contradistinction to the normal review authorized by 29 U.S.C. 660(a), as enabling "the Secretary to obtain *an automatic court enforcement order* when no review [of the Commission's

[9]

order by the employer] has been requested within such 60 day period." Leg. Hist. 155, 260, 386, 462-463, 557. (The Senate Report also noted that "In the case of such petitions . . . the clerk of the court of appeals *would* enter a decree enforcing the order of the [Commission] . . . ." Leg. His. 1974. (Emphasis added.)) The reported House bill contained a provision which was closely analogous to standard NLRB petitions for enforcement and simply provided that "The Secretary shall have power, upon issuance of an order . . . to petition any * * * court * * * for appropriate relief," i.e., enforcement. Leg. Hist. 837, 854, 871. The House-passed Steiger amendment was even more limited, providing that "The Secretary may also obtain judicial review or enforcement of a decision of the Commission"

within sixty days but not after. Leg. Hist. 1102, 1112. The Conference Committee rejected the House language and adopted the Senate version practically *verbatim*, stating that "The Senate bill, but not the House amendment, permitted un[appealed] orders of the Commission to be entered as orders of the Court of Appeals," Leg. Hist. 1167, 1192—a rejection which appears wholly unnecessary if it believed petitions for summary enforcement no different than enforcement petitions of the NLRB.

The procedure we have adopted as outlined above will enable this court to effect the statutory intent of prompt abatement of safety hazards by disposing of § 660(b) petitions with reasonable dispatch, where an employer has failed to comply with OSHA orders which have become final and not subject to review under the terms of the statute. If the panel determines that the OSHA decision is final and not subject to review and, therefore, further briefing or oral argument is not required, the Clerk may be instructed to sign and enter an order of summary enforcement. If an answer to the petition is filed raising issues that are substantial or which have not been decided previously by the court, the Secretary may be directed by the court to make a substantive response. If

[10]

the finality of the OSHA orders is disputed and the panel cannot resolve to its satisfaction on the basis of the record the issue of the propriety of summary enforcement, further briefing and oral argument, where found to be necessary, may be directed. This procedure will enable the court to consider contested petitions for summary enforcement in the detail required by particular cases, where OSHA orders are subject to review; yet grant sum-

BLEED THROUGH

mary enforcement with reasonable promptness in uncontested cases or where OSHA orders are found to have become final and not subject to review.

3) The Statutory Provisions

Before considering the other constitutional issues, it is necessary to summarize briefly the provisions of the statute.

The Occupational Health and Safety Act of 1970 was enacted with the ambitious purpose "to provide for the general welfare and to assure as far as possible to every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). The act is applicable to businesses affecting interstate commerce. 29 U.S.C. § 651(b)(3). Pursuant to § 657, inspections are made by the Secretary of Labor to detect violations of the act and the applicable administrative regulations. Upon discovery of such a violation, a citation may be issued under § 658, which may contain monetary abatement penalties as authorized by § 666. The employer then has fifteen working days from the receipt of notice to challenge the citation or proposed assessment of a penalty. Otherwise the orders become final and unreviewable by any court or agency. § 659(a).

If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued, within the period permitted for its correction, the Secretary is required to notify the employer by certified mail of

[11]

such failure and of the penalty proposed to be assessed under § 666. The employer has fifteen working days

within which to contest the Secretary's notification or the proposed assessment of penalty. If the employer fails to give such notification within fifteen working days, the notification and assessment is deemed to be a final order of the Commission and "not subject to review by any court or agency." § 659(b).

If the employer exercises his right to contest, the Commission affords an opportunity for a hearing under § 659(c). The hearing is conducted by an Administrative Law Judge, § 661(i), and may be reviewed by the Commission. Any person adversely affected or aggrieved by an order of the Commission may obtain a review in the Court of Appeals by filing a petition within sixty days following the issuance of the final order of the Commission. § 660(a).

The legislative history of the statute was summarized as follows in *Brennan v. OSHRC*, 487 F.2d 438, 439 (8th Cir. 1973):

> The Act was adopted in 1970 and became effective on April 28, 1971. The bill as passed is a compromise between two competing bills that were submitted both to the House and to the Senate. One bill was administration-backed and the other was strongly supported by organized labor. Although the difference in the two bills primarily involved whether both rule-making and enforcement powers should be located in the same agency, it is clear that both sides favored a bill which would establish a comprehensive program that would substantially reduce the large number of job-related deaths, injuries and health hazards which have existed. It is estimated that 4.1 million businesses and 57 million employees are affected.

BLEED THROUGH

Appendix A

The Act provides for the development of a "laundry-list" of violations. Companies are subject to periodic compliance inspections which are carried out at random

[12]

either upon complaint or upon the inspector's own initiative. Advance notice of an inspection is prohibited, and violators of this provision are subject to criminal sanctions. Violations may be either of standards promulgated by the Secretary or of the "general duty" provision, a catch-all provision intended to supplement the standards formulated by the Secretary.

A violation is "serious" if there is a possibility of an accident and a substantial probability that death or serious physical injury would result. Under the Act, a penalty may be imposed of up to $1,000 for a non-serious violation. Upon receiving notice from the Secretary of the citations and proposed penalties, the employer has 15 days to contest either the citation or the proposed penalty or both by notifying the Secretary who transmits the information to the Commission. The Commission is an independent adjudicatory agency established under the Act, 29 U.S.C. § 661. The Commission is authorized to conduct hearings under § 659(c), which hearings are conducted under § 5 of the Administrative Procedure Act, 5 U.S.C. § 554. (Footnotes omitted.)

The record in the present case demonstrates conclusively that the respondent, Winters, failed to give notice to the Secretary that it wished to contest the citation and proposed notice of penalty, within fifteen working days from the receipt thereof. Notice to Winters of the citation and proposed assessment of penalty is documented on

the record by certified mail receipts signed by Winters through a representative whose authority is not questioned. Therefore, under the provisions of the statute, the notification and assessment is deemed to be a final order of the Commission and "not subject to review by any court or agency." § 659(a) and (b).

Respondent contends that the record does not show substantial evidence of serious violations. This court will not pass on this issue, because we have determined in this case that the OSHA decision is final and not subject to review under the provisions of the statute.

[13]

4) The Due Process Question

The most serious constitutional question raised by respondent is that it has been denied due process of law by the OSHA order which became final and unreviewable on its merits by the Commission or by this court because notification of contest was not filed within fifteen working days from the time respondent received notice of the citation and proposed penalty.

We agree with the decision in *McLean Trucking Co. v. OSHRC*, 503 F.2d 8, 11 (4th Cir. 1974), in which the court said:

> McLean also contends that the Act denies it procedural due process by permitting the Secretary to issue citations with proposed penalties without giving employers an opportunity to be heard. It should be noted, however, that it is only where the employer fails to contest the citation that it becomes final and unreviewable. 29 U.S.C. § 659(a). If the employer contests the citation, the Commission is required to conduct a

BLEED THROUGH

hearing and thereafter "issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty * * *." 29 U.S.C. § 659(c). "Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process." Yakus v. United States, 321 U.S. 414, 433, 64 S. Ct. 660, 671, 88 L. Ed. 834 (1944).

Under the provisions of the Act, respondent had an opportunity for a due process hearing before an Administrative Law Judge and the Commission, and the right to judicial review before this court. It forfeited that right by failing to give notification to contest within fifteen working days. Although it may be argued with logic that the time period is too short, this is a matter for determination by Congress. *Yakus v. United States*, 321 U.S. 414, 433 (1944). The con-

trolling fact is that respondent had a right to a due process hearing, which it failed to exercise. We find no deprivation of due process.

5) Stay Pending Review

Respondent further contends that the statute is unconstitutional because the OSHA sanctions would continue to run pending action on a petition to review. This contention is erroneous. The statute expressly provides that the Court of Appeals "shall have power to grant such temporary relief or restraining order as it deems just and proper." § 660(a). Stay orders by Courts of Appeals also are authorized by 28 U.S.C. § 2349 and Fed. R. App.

P. 18. The regulations contain a provision for stay of a final order by the Commission.[2]

6) Other Constitutional Contentions

Respondent makes numerous other attacks upon the constitutionality of the Act, including the following:

(1) The penalties imposed by statute are criminal. Therefore, constitutional safeguards should have been provided, including: the Sixth Amendment right to counsel, the Fifth Amendment right against self-incrimination, and the Fourth Amendment right against unreasonable searches and seizures;

(2) The statute violates the equal protection clause of the Fourteenth Amendment in that the Secretary has access to enforcement powers of the Court of Appeals but respondent is denied judicial review unless timely contest has been made in the administrative proceedings;

[15]

(3) Congress has (a) exceeded its delegated powers under the Constitution and (b) invaded the powers reserved to the States under the Tenth Amendment;

(4) OSHA denies citizens the right to jury trial in civil cases as guaranteed by the Seventh Amendment; and

---

[2] **§ 2202.92 Stay of final order.**

(a) Any party aggrieved by a final order of the Commission may, while the matter is within the jurisdiction of the Commission, file a motion for a stay.

(b) Such motion shall set forth the reasons a stay is sought and the length of the stay requested.

(c) The Commission may order such stay for the period requested or for such longer or shorter period as it deems appropriate.

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(5) The right to review is "chilled" in that there is no automatic stay of the abatement penalty period during review.

We agree with the decisions of other Circuits in rejecting these contentions. *See*, *Lake Butler Apparel Co. v. Secretary of Labor*, ___ F.2d ___ (No. 73-3518, 5th Cir., Sept. 15, 1975); *Sheenan Co. v. OSHRC*, 520 F.2d 1036 (5th Cir. 1975); *Bloomfield M. Cont. Inc. v. OSHRC*, 519 F.2d 1257 (3d Cir. 1975); *Irey v. OSHRC*, 519 F.2d 1200 (3d Cir. 1975); *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990 (5th Cir. 1975); *Beall Const. Co. v. OSHRC*, 507 F. 2d 1041 (8th Cir. 1974); *McLean Trucking Co. v. OSHRC*, 503 F.2d 8 (4th Cir. 1974); *American Smelting Co. v. OSHRC*, 501 F.2d 504 (8th Cir. 1974).

The petition for rehearing is denied. No costs are assessed. Each party will bear its own costs in this court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 75-1367

FILED
JAN 14 1976
John P. Hehman, Clerk

PETER J. BRENNAN, SECRETARY OF LABOR,
Petitioner,

v.

WINTERS BATTERY MANUFACTURING COMPANY,
Respondent.

BEFORE: PHILLIPS, Chief Judge, PECK and LIVELY, Circuit Judges.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

APPENDIX B

Statutory Provisions Involved

TITLE 29, UNITED STATES CODE

* * *

§ 651. Congressional statement of findings and declaration of purpose and policy

. . .

(b) The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions . . . .

§ 652. Definitions

For the purposes of this chapter—

. . . .

(3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific islands), or betweem points

in the same State but through a point outside thereof.

. . . .

(5) The term "employer" means a person engaged in a business effecting commerce who has employers, but does not include the United States or any State or political subdivision of a State.

. . . .

§654. Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

* * *

§658. Citations

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer. Each citation

shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

§659. Enforcement procedures

(a) If, after an inspection or investigation, the Secretary issues a citation under section 658(a) of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of this title and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of

any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 666 of this title by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or it, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abate-

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ment requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. . . .

§660. Judicial review

(a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order by modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered

by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 or Title 28. Petitions filed under this subsection shall be heard expeditiously.

(b) The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) of this section shall govern such proceedings to the extent applicable. If no petition

for review, as provided in subsection (a) of this section, is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretray which has become a final order of the Commission under subsection (a) or (b) of section 659 of this title, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a) of this section, the court of appeals may assess the penalties provided in section 666 of this title, in addition to invoking any other available remedies.

* * *

§666. Civil and criminal penalties

. . . .

(b) Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $1,000 for each such violation.

(c) Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined

not to be of a serious nature, may be assessed a civil penalty of up to $1,000 for each such violation.

. . . .

(j) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

. . . .

APPENDIX C

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant v. THE HYDRATE BATTERY CORPORATION, Respondent	OSHRC DOCKET NO. 2311

DECISION

Before MORAN, Chairman; VAN NAMEE and CLEARY, Commissioners.

VAN NAMEE, Commissioner:

The only issue remaining in this case is whether Judge William E. Brennan erred by modifying a citation for an alleged serious violation of the Occupational Safety and Health Act (29 U.S.C. 651 *et seq.*) to other than serious on the ground that Complainant failed to prove to a substantial probability that excessive concentrations of air borne lead existing in Respondent's workplace[1] would produce serious physical harm. He based his decision on the nature of the evidence produced by the Secretary. That evidence comprised the testimonial statements of a

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1 29 C.F.R. 1910.93(b) Table G-2 prescribes a time weighted limit value of 0.2 milligrams per cubic meter for lead and its inorganic compounds.

chemical engineer and an analytical chemist and certain hearsay comprising an article by one Doctor Kehoe and the engineer's statement concerning a supposed guideline issued by the National Institute for Occupational Safety and Health.[2] Judge Brennan found this evidence incompetent on the issue of the physiological effect of the levels of air borne lead existing in Respondent's (Hydrate) workplace on its employees.

I ordered review because of an apparent conflict with our decision adopting Judge Brennan's report in *American Smelting and Refining Co.*, Dkt. 10, BNA 1 OSHC 1256, CCH E.S.H.G. para. 16,456 (1973), *pet. denied*, 501 F.2d 504 (8th Cir., 1974). In view of the judge's specific reasons for disposition herein I requested submissions on whether the citation for serious violation in this case may be affirmed by officially noticing facts not of record and I requested that facts considered appropriate for such notice be identified.

In reply, the Secretary argues that we may take official notice of legislative facts including those that are of record in other cases involving other parties. He therefore asks us to take notice that according to scientific studies including a NIOSH criteria document, entitled *Occupational Exposure to Inorganic Lead* (1972) exposure to dangerous levels of air borne lead causes serious physical harm.

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[2] The guideline is not of record except as it is represented by the testimonial statement of its content. According to that statement NIOSH expressed an opinion that exposures above 0.6 milligrams per cubic meter are serious.

[3]

We do not suppose any reasonable person can take issue with the fact that excessive exposure to dangerous levels of air borne lead can cause serious physical harm. But even if we assume the fact, that does not prove the Secretary's case before us.

Here, he measured the exposure of Hydrate's employees for one eight hour period. He obtained the following results:

Employee	Exposure in mg/M^3
Wright, C.	0.926
Wright, D.	0.206
Russell, G.	0.624
Morrell, D.	0.513
Saunders, R.	1.088

No evidence was adduced upon which we could conclude that Hydrate's employees were exposed to excessive lead concentrations for any period greater than eight hours. On the contrary, Hydrate adduced evidence of air samples and blood tests taken in 1967 and 1972 that militate against a conclusion that its employees were exposed to excessive lead on a chronic basis.

We deem the distinction between acute and chronic exposure to be significant. The recommendations of the NIOSH criteria document mentioned above are predicated on long term or chronic exposure. The record in the *American Smelting* case demonstrated exposure to excessive airborne lead on a chronic basis.

But here all we have is a record demonstrating excessive exposure on a short term or acute basis. And there is no evidence that such exposure will most likely result

[4]

in serious physical harm.

Accordingly, the judge's report is adopted for the reasons assigned by him and for the reasons assigned herein. It is so ORDERED.

FOR THE COMMISSION:

/s/ William S. McLaughlin
WILLIAM S. McLAUGHLIN
EXECUTIVE SECRETARY

DATE: Mar 19 1975

MORAN, Chairman, Concurring:

I believe Judge Brennan correctly decided this case and I join in the affirmance of his decision for the reasons given therein.

[5]

CLEARY, Commissioner, DISSENTING:

I dissent. The majority ignores the well-documented hazards of exposure to air borne lead, and overlooks the realities of health hazard enforcement under the Act.

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Appendix C

I.

Judge Brennan held that the Secretary failed to prove that the levels of air borne lead in respondent's workplace constituted a serious violation of the Act. This decision was based largely on the Judge's refusal to give any weight to the Secretary's references to materials on lead issued by the National Institute for Occupational Safety and Health (NIOSH) and an article by Dr. Robert A. Kehoe, a recognized expert on industrial lead poisoning. In addition, the Judge refused to admit into evidence three articles on lead offered by respondent, one of which was the article by Dr. Kehoe. Judge Brennan termed the articles "three grand hearsay documents, . . .not competent evidence . . .as well as lacking sufficient relevancy and materiality."

Regarding the Secretary's testimony that relied on the NIOSH documents and Kehoe article, the Judge wrote in his decision that they were "hearsay, which, although admissible, can not be used to support a finding unless otherwise supported by competent evidence."[3] The Judge's

[6]

reliance on the residuum rule was apparently adopted sub silentio by the majority. I disagree with this holding.

The admissibility of hearsay evidence in administrative adjudications is well recognized. *Copperweld Steel Co.*,

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[3] The paradox created by the Judge's admitting the hearsay testimony, but refusing to admit the hearsay articles introduced by respondent is not resolved by the record or the Judge's decision. One possible explanation is that the Judge differentiated between documentary and testimonial hearsay. Nevertheless, assuming there is a meaningful distinction, and that one type of hearsay should be excluded, the Judge's decision is erroneous. See infra.

No. 5110 (February 8, 1975) (concurring opinion); 2 K. Davis, *Administrative Law Treatise* § 14.08 (1958). The only issue is whether uncorroborated hearsay alone may support an evidentiary finding. The older cases hold that hearsay evidence alone cannot support an evidentiary finding, but that there must be a "residuum" of "competent" evidence. *See Bridges v. Wixon*,326 U.S. 135 (1945); *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 230 (1938); *Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 113 N.E. 507 (1916).

In recent years, the trend in the federal courts has been toward an unqualified rejection of the residuum rule. *See* K. Davis, *Administrative Law Text* § 14.08 at 281 (1972). In *Richardson v. Perales*, 402 U.S. 389 (1971), the Supreme Court held that reliable and probative hearsay testimony alone may support an evidentiary finding. In *Perales*, the hearsay was in the form of written medical reports. The Court "clarified" Chief Justice Hughes' famous remark in *Consolidated Edison*, *supra*, that "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence." The Court stated:

> "The contrast the Chief Justice was drawing, at the very page cited, was not with material that would be deemed formally inadmissible in judicial proceedings but with material 'without a basis in evidence having rational probative force.' This was not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value. The opposite was the case."

402 U.S. at 407.

[7]

In my view, reliable and probative hearsay along may be sufficient to support an evidentiary finding. *See Copperweld Steel Co., supra* (concurring opinion); *B & K Paving Co.*, No. 59 (September 5, 1974) (concurring opinion).

In the present case, Judge Brennan erred by not giving greater weight to the Secretary's testimonial evidence. That evidence reflected expert opinion to the effect that exposure to air borne lead in the amounts detected at respondent's workplace could result in serious physical harm.

The Judge also erred in refusing to admit into evidence the written articles on lead that were offered by respondent. The Kehoe article was not objected to by the Secretary. The Judge was therefore bound to accept it into evidence and accord it its natural probative weight. *Cf. Opp Cotton Mills v. Administrator of Wage & Hour Div., Dept. of Labor*, 312 U.S. 126, 154-55 (1941). In any event, all of the written articles could have been admitted under the learned treatises exception to the hearsay rule. *See* 6 *Wigmore on Evidence* §§ 1690-93 (3d ed. 1940); *McCormick's Handbook of the Law of Evidence* § 321 (2d ed. 1972). As the District of Columbia Circuit stated in *Dolcin Corp. v. F.T.C.*, 219 F.2d 742, 749 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 981 (1955): "We think authoritative scientific writings can—and should—be freely used by administrative agencies" (footnote omitted).

II.

In his brief before the Commission, the Secretary argues that the Commission should take official notice that

air borne lead in the quantities measured at respondent's workplace could cause death or serious physical harm.

[8]

Even though conceding that "excessive exposure to dangerous levels of air borne lead can cause serious physical harm," the majority refused to take official notice of recognized scientific writings that detail the seriousness of air borne lead exposure. I disagree with this position. I believe the Commission is compelled to take official notice of such documents.

Official notice is more expansive than judicial notice. In enacting the APA, Congress adopted the view:

> "that 'the permissible area of official notice be extended' so as to avoid 'laborious proof of what is obvious and notorious' . . . .

Attorney General's Manual on the Administrative Procedure Act 79 (1947). In addition, even as to judicial notice the Second Circuit in *Continental Can Co., Inc. v. United States*, 272 F.2d 312, 315 (2d Cir. 1959), stated:

> "In reaching their decisions, neither Courts nor administrative bodies should ignore the realities of life and disregard common knowledge even though such knowledge may not have achieved a place within the purview of judicial notice."

This is especially true of matters "which the agency be reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge." *Attorney General's Manual*, *supra* at 80.[4]

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[4] Agencies may take official notice of facts at any stage in a proceed-

(continued on following page)

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[9]

Inhalation and ingestion of inorganic lead in excess concentrations can lead to anemia, colic, kidney disease, brain damage, and cardiorespiratory disorders, to name but a few. *See* NIOSH, ***Criteria for a Recommended Standard . . . Occupational Exposure to Inorganic Lead*** at III-3 *et seq.* (1972). The Secretary's air sampling tests indicated readings substantially above the maximun permissible limits. These facts, together with the well documented hazards of lead poisoning, are sufficient to find a serious violation. *Cf. American Smelting & Refining Co. v. O.S.H.R.C.*, 501 F.2d 504 (8th Cir. 1974). For the majority to hold differently is to "eviscerate the import of the regulation and flout the purposes of the enabling legislation." *Brennan v. Southern Contractors Service & O.S.H.R.C.*, 492 F.2d 498, 501 (5th Cir. 1974).

III.

In connection with hearsay and official notice, it must be noted that the majority opinion ignores the realities of enforcement under the Act. In fiscal 1974, citations were issued for 11,284 health violations. This number is expected to increase dramatically in fiscal 1975 and future years. It is unrealistic to expect that in every hearing involving a health hazard that the Secretary will

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(Continued from preceding page)

ing—even in the final decision—but the matters thus noticed should be specified and 'any party shall on timely request be afforded an opportunity to show the contrary.'

Attorney General's Manual on the Administrative Procedure Act 80 (1947)

The majority's holding in this case, however, makes it unnecessary to discuss the procedure that would be available to respondent to object to the noticed information.

have the testimony of an expert witness. This may be impossible. Official notice by the Commission and the receiving into evidence of authoritative scientific documents are the only solutions.

The use of written scientific information is strongly urged in 6 *Wigmore, supra* § 1691 at 5:

> "Costly litigation is the parasite of justice; and we pay too high a price when we refuse to accept our information from a competent source ready at hand. Moreover, there are certain matters upon which the
>
> [10]
>
> conclusions of two or three leaders in the scientific world are always preeminently desirable; and it is highly unsatisfactory that, except in the region where they may happen to live, the opinions of world-famous investigators should have no standing of their own. Whether it is merely a question of relative expense, the principle of Necessity . . . is equally satisfied; and we should be permitted to avail ourselves of their testimony in the printed form in which it is most convenient" (footnote omitted).

A greater use of official notice would also benefit private parties such as the employer and affected employees.

IV.

During the inspection of respondent's workplace, the Secretary measured the exposure of five of respondent's employees to air borne lead for an eight hour period. The tests were performed by an experienced compliance officer and the results were determined by an expert analytical chemist. The testing procedure of using air pumps

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attached to various workers was specifically approved by the Eighth Circuit in *American Smelting, supra.*

The test results indicated that all five employees were exposed to concentrations of air borne inorganic lead in excess of the threshold limit value (TLV) of two-tenths milligrams of lead per cubic meter of air (.2 mg/M^3) prescribed by the standard at 29 CFR § 1910.93(b).[5]

[11]

In fact, one employee's exposure level was measured at 1.088 mg/M^3, *more than five times* the allowable limit.

The majority states that these tests are inconclusive to establish a serious violation and that prolonged exposure on a "chronic" basis is required to prove a serious violation. The majority relies on air samples and blood tests taken in 1967 and 1972 by the company to conclude that the excess exposure was not chronic. The majority makes a distinction between "chronic," or long term, and "acute" exposure to lead. The majority is making a distinction which may have severe consequences. I strongly disagree. The majority is saying in effect that workers must be exposed to the harmful effects of lead poisoning for a prolonged period of time before the exposure levels at their workplace may be considered a serious violation. This may invite casuistry in compliance with the standard.

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5 Although the present limit is .2 mg/M^3, NIOSH has proposed that the maximum level be set at .15 mg/M^3. See NIOSH, **Criteria for a Recommended Standard . . . . Occupational Exposure to Inorganic Lead** (1972). Moreover, as noted by the Eighth Circuit in **American Smelting & Refining Co. v. O.S.H.R.C.**, 501 F.2d 504, 513 n.19 (8th Cir. 1974), other countries have set lower limits, including: Soviet Union, .01 mg/M^3; Czechoslovakia, Poland, and Japan, .05 mg/M^3; and Great Britain and Yugoslavia, .15 mg/M^3.